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**In the Supreme Court of the
United States**

**October Term, 1976
No. 76-1648**

KENNETH SHALOM MILLROOD,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

**COMMONWEALTH'S ANSWER TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA**

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Question Presented

1

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QUESTION PRESENTED

Is it not permissible under the Due Process Clause of the 14th Amendment for a defendant to bear the burden of showing that he is registered when the issue of registration is raised under a statutory charge of "possession with intent to . . . deliver a controlled substance by a person not registered under this act"?

REASONS FOR DENYING THE WRIT

The Petitioner, Millrood, was indicted and convicted for "possession with intent to deliver" marijuana in violation of Section 13(a)(30) of The Controlled Substance, Drug, Device & Cosmetic Act of Pennsylvania, 35 P.S. §780-113(a)(30) which prohibits the following acts:

"(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance by a person not registered under this act . . ."

Marijuana is scheduled by the Act as a "controlled substance". 35 P.S. §780-104. The Act provides for the registration with the Secretary of Health of persons who distribute controlled substances. 35 P.S. §780-104.

The Petitioner's argument, that the absence of registration is an essential element of the crime and as such he cannot be required to bear the burden of proving registration, has been recently addressed and resolved in the case of *Commonwealth v. Stawinsky*, 234 Pa. Superior Ct. 308, 339 A.2d 91 (1975).

In an unanimous opinion the Court held that proof that a defendant is not registered with the Secretary of Health to manufacture, distribute and sell controlled substances is not a necessary element of the crime of violating the Controlled Substance Act and requiring defendant to prove the exception does not unconstitutionally shift the burden of proof to the defendant.

The Court reasoned that since the Act was designed to limit traffic in certain stated substances (marijuana is one such substance) the fact that one can so register and then be able to manufacture, distribute, etc. makes that person exempt from the Act. Since an individual's status of exemption becomes an issue the Court examined Section 21 of the Act (35 P.S. §780-121) which provides:

"In any prosecution under this Act, it shall not be necessary to negate any of the exemptions of this act in any complaint, information or trial. The burden of proof of such exemption is on the party claiming it."

The Court cited *Commonwealth v. Stoffan*, 228 Pa. Superior Ct. 127, 323 A.2d 318 (1974), a case which interpreted this provision and stated that "the exemptions and exceptions" referred to in Section 21 of the Act must be taken to mean only those which do not state necessary elements of the crime proscribed lest an unconstitutional result obtain.

Judge Spaeth in his concurring opinion after a determination that §13(a)(30) applied to everyone (all persons) stated:

". . . The exemption clauses in those sections do not refer to conduct, i.e., to essential elements of the crimes (possession, sale . . .), but to persons who are to be exempted (persons 'registered under this act'). Thus the exemption applies if the accused has attained a certain status; it has nothing to do with the conduct that would constitute a crime if performed by someone else. Status does not constitute an essential element of the crimes. Rather, it only

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provides a personal defense. Thus the burden of proving it can be constitutionally shifted to the person claiming it." Pa. at 316-317, A.2d at 94.

The Court in *Stawinsky* stated:

"Recognizing that the registration provision of the Act does grant an excuse for conduct otherwise prohibited, and recognizing that the Act intends control over certain substances, we hold that proving a defendant not to be registered is not a necessary element of the crime of violating the Act. With this belief, we find that the cases support a conclusion that it is not a violation of due process to place upon a defendant the burden of proving his registration" Pa. at 312, A.2d at 92.

The Petitioner concedes that the instant case is squarely on point with the *Stawinsky* case, supra, in determining that the absence of registration was not a necessary element of the crime. Petitioner argues, however, that *Commonwealth v. McNeil*, 461 Pa. 709, 337 A.2d 840 (1975), has somehow changed the status of the law on this issue. Petitioner's reliance on *McNeil*, supra, is misplaced. In *McNeil*, the defendant was charged with a violation of the Uniform Firearms Act which provided:

"No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of residence, without a license therefor as hereinafter provided."

The Court held on this particular set of facts that the absence of a license was an essential element of the crime which the Commonwealth had to prove beyond a reasonable doubt.

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The differences in the facts and circumstances between the instant case and *McNeil* are immediately apparent and so great as to render *McNeil* inapplicable.

Under the Uniform Firearms Act there are specific provisions dealing with the licensing of weapons. *Blacks Law Dictionary Revised*, 4th Ed. (1968), defines license as a "certificate or document itself which gives permission" while registration is defined as a "Recording; inserting in an official register; enrollment". It is clear from the plain meaning of the words that to obtain a license and to register are two very different acts as are the consequences. Applying this to the instant case it is clear that when an individual obtains a license as provided by statute he has specific permission to do an act, i.e., possess a firearm (*McNeil* supra) by the mere act of acquiring the license, while to register does not automatically give the individual the right to do an act, i.e., possess a controlled substance, marijuana, unless the individual shows by his status that he falls within one of the exceptions of the Act.

There is no such licensing procedure applicable under the Drug, Device & Cosmetic Act, 35 P.S. 780, for the purchase, sale, manufacture or delivery of marijuana. Petitioner could never obtain a license to purchase, sell, manufacture or deliver marijuana under 35 P.S. 780. He could only register and then only if he was within one of the exceptions could he possess a controlled substance. Here Petitioner did not register, therefore, his status as an individual privileged to distribute a controlled substance was never shown. Since Judge Spaeth points out in *Stawinsky* that status is only a personal defense and not an essential element of the crime, Petitioner had the

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burden of showing his registration which he did not do. Since firearms are by their nature so inherently different from narcotics and since licensing and registration requirements are not analogous given their respective meanings, clearly *McNeil* has no effect on the *Stawinsky* decision which was delivered scant weeks before *McNeil*.

McNeil is further inapplicable since the Superior Court of Pennsylvania held in *Commonwealth v. Williams*, 237 Pa. Superior Ct. 91, 346 A.2d 308 (1975), that *McNeil*, supra, would be given prospective application only. In the instant case as in *Commonwealth v. Yaple*, 238 Pa. Superior Ct. 336, 357 A.2d 617 (1976), the Petitioner's case was tried prior to *McNeil* and thus the burden was on the defendant to prove that he had a license if, in fact, he did have one. Since the Petitioner offered no such proof his conviction was proper. See *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967).

It is the Commonwealth's position that *Stawinsky*, supra, is still the law in Pennsylvania and that the absence of registration in a "controlled substance" case is not an essential element of the crime which the Commonwealth must establish as a part of its case.

The Petitioner's reliance on *People v. Rios*, 386 Mich. 172, 191 N.W. 2d 297 (1971), *People v. Harris*, 43 Mich. App. 531, 204 N.W. 2d 549 (1972), and the line of companion Michigan cases is also misplaced.

In *Rios* the lack of a license was held to be a necessary element of the crime of selling narcotics and thus the burden of showing lack of a license fell on the prosecution. Again as in the firearms cases a license was an issue and not registration. It is significant to note that Michi-

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gan's statute which was at issue in *Rios* specifically provides: "Any person not having a license . . . who shall sell, manufacture, produce . . . any narcotic drug shall be deemed guilty of a felony" MCLA §335.152 (Stat. Ann. 1957 Rev. §18.1122). Nowhere is registration which is the central issue in the instant case a part of the Michigan statute.

Of particular importance is the fact that Michigan has a specific statute: MCLA §335.53 (Stat. Ann. 1957 Rev. §18.1073), entitled Narcotics, Licenses, which specifically allows the lack of a license to be proved at trial by a statement certified by the Commissioner of the Michigan State Police. Pennsylvania has no such statutory provision. If the Commonwealth was forced to prove the lack of a license in the absence of such a statute as Michigan's it would be a very time consuming and a costly expense on an overburdened administration of justice.

The United States Supreme Court in *Mullaney v. Wilber*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), stated

"This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, e.g. *Murdock v. City of Memphis*, 20 Wall 590, 22 L.Ed. 429 (1875); *Winters v. New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948), and that we are bound by their constructions except in extreme circumstances not present here".

It is clear that the Petitioner has demonstrated no "extreme circumstances" in the instant case. Thus *Stawinsky*, supra, must be considered the final word in Pennsylvania law on this issue of registration.

Petitioner's suggestion that the Commonwealth bear the burden of proving a negative is misplaced. In *Tritt v. United States*, 421 F.2d 928 (10th Circuit 1970), the United States Court of Appeals in affirming a conviction for the sale of narcotics discussed Title 21 U.S.C., §331, §360 which makes it a criminal act for any person whatsoever to sell or deliver drugs unless he is a member of a class of persons excepted under the provisions of §360(a). The Court cited with approval *Walker v. United States*, 176 F.2d 796 (9th Circuit), where the Court stated: "That a statute contains exceptions or exemptions does not mean that they must be negated in the indictment nor need it negate other possible defenses." And in *Nicoli v. Briggs*, 83 F.2d 375 (10th Circuit), the Court said "... it has uniformly been held that it is unnecessary for the government to allege or prove that the defendant does not come within a class excepted by the statute. Where there is a general provision defining the elements of an offense, neither the indictment nor the proof need negative exceptions". The Court in *Tritt* concluded that "If in any instance the appellant believed that he came within one or more of the exceptions enumerated in §360(a), it was incumbent on him to say so."

In *United States v. Benish*, 389 F. Supp. 557, affirmed 523 F.2d 1050, certiorari denied 424 U.S. 954 (1975), the United States District Court for the Western District of Pennsylvania upheld defendant's conviction for distributing a controlled substance, "Phendimetrazine". There was no evidence that defendant had obtained or even applied for registration nor was there any evidence that the defendant was entitled to registration. The de-

fendant contended that it was the burden of government to establish their non-entitlement as part of the crime.

The Court discussed 21 U.S.C., §885(a)(1) after which Pa. Section 21 (35 P.S. 780-121) *supra* was modeled. §885(a)(1) provides as does Section 21, in Pennsylvania, that the government need not negate any statutory exemption or exception in any indictment or at trial but that "the burden of going forward within the evidence of such exemption shall be on the person claiming its benefit." The Court held that this is a purely procedural presumption and stated: "It places on the defendants (who are presumably most familiar with and best able to demonstrate their own qualifications and efforts to obtain registration) to go forward with the evidence." See also *United States v. White*, 463 F.2d 18 (1972), *United States v. Rosenberg*, 515 F.2d 190 (1975).

It is clear from these cases that the burden of proving the negative, exemption or exception is correctly placed on the individual claiming its benefit, in this instance the Petitioner. Clearly there was no hardship on the part of the defendant to prove that he was registered. In fact he would have been acquitted and would surely have admitted evidence if he was so registered. Since the Petitioner offered no proof that he was in fact registered he was properly convicted.

The Commonwealth submits that since *Siawinsky* is the controlling law in Pennsylvania and the Court has determined properly that absence of registration is not an essential element of the crime of violating the Controlled Substance Act the defendant has suffered no due process violation and his conviction must be upheld.

Reasons for Denying Writ

CONCLUSION

For the reasons stated above plenary review by this Court should be denied. Further, since allocatur was properly refused by the Supreme Court of Pennsylvania this case should not be remanded and the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,
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